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4. RIGHTS OF PASSAGE: LAW AND THE BIOPOLITICS OF DYING

Patrick Hanafin

INTRODUCTION

The figure who refuses is a particularly troubling one for law. Such a figure engages in a refusal to submit to the biopolitical order. One such figure is the terminally ill person who states that they would prefer not to live. This gesture expresses what Gilles Deleuze has termed the mode of being *as if already gone* (Boutang, 1995). To be as if already gone is to accept death and not allow it to become the limit of thinking. This is a living with, or being with death, which sees it not as an intruder but as that without which we cannot live. Those who have exhausted their end seek the right to die with dignity. This is a choice to die, which allows the body to speak its end rather than have that end dictated by the voice of an expert, legal or medical. The person who seeks to die is, to paraphrase Foucault, ‘the Passenger *par excellence*: that is, the prisoner of the passage’ (Foucault, 1967, p. 11). This notion of a passenger on the way to death bespeaks our existence, prisoners of our being, passing towards death.

When an individual goes before the law to claim this right not to live, judges, in a futile effort to put death on hold, talk, animatedly and excitedly, about life. It is vital from

the point of view of legal and political elites that the insubordinate citizen is *seen* to be managed. The ultimate threat to a legal order built on death control is the individual who refuses to accept law's prohibition and seeks to self-style her death. She refuses to be styled by law's speech. In self-styling one's death one is choosing to affirm one's life and the desire not to live a degraded existence.¹ This act is lost on those blinded by a conservative morality which opposes death to life. This majoritarian politics of survival or '*vitapolitics*' attempts to arrest death by composing a narrative which valorises Life. In other words, the state's interest in preserving life becomes the interest in preserving the life of the state. The state attempts to put death to work in the service of life. However, as Lars Iyer reminds us, every 'attempt to put death to work is contested by dying itself, that is, by the "other" Lazarus who refuses to rise and come towards us' (Iyer, 2004, p. 153).

A 'STRANGE KIND OF PROSOPOPOEIA'²

The liberal social compact is built on the desire to survive. In this schema man looks constantly ahead to the moment of his death and his legacy. This becomes the be all and end all of life in the shadow of death. Indeed it becomes the foundation of the modern liberal order with the creation of the social contract as a means of survival, as a temporary immunity from death (see further Cavarero, 1995, pp. 57–90). The legal regulation of choosing how one dies reveals that the individual's power to decide how she lives or dies is ignored at best or curbed at worst. The power to decide is taken from the individual in the name of an abstract notion of Life. The terminally ill person who desires to die is

prevented from doing so by legal obstacles. This is part of a wider management of individual lives or what Jean Baudrillard has termed 'death control'. In this paradigm what we witness is:

a forced 'life for life's sake' ... agony prolonged at all costs... whether we execute people or compel their survival... the essential thing is that the decision is withdrawn from them... 'you shall not die', not in any old way, anyhow (Baudrillard, 1993, p. 174).

I want to look at one legal instantiation of this deathbound normative narrative. This example, along with many others which have been decided in a similar way, displays a tendency in the western legal tradition to valorise true life, the disembodied life of pure and abstract thought over mere incarnate life. With the exception of a very small number of states (Belgium, the Netherlands, Oregon, Switzerland), the western legal tradition does not condone a right to die using active means, either in the form of voluntary euthanasia or indeed physician-assisted suicide. On the other hand, many states allow an individual to make what is commonly called a living will or advance directive, which permits the withdrawal of artificial feeding and hydration in the event that the person ever finds herself or himself in a persistent vegetative state from which there is no hope of recovery. This model is based on the Christian ethical tradition which distinguishes active from passive means of euthanasia.

The case I want to look at in some detail is exemplary of the legacy of this normative model. The United States' Supreme Court's adjudication in the jointly heard

cases of *Washington v Glucksberg* and *Quill v Vacco* (521 U.S. 702 (1997)) came about as the result of decisions on the issue of physician-assisted suicide by the Second and Ninth Circuit Courts of Appeal, which gave constitutional protection to physician-assisted suicide, one on the grounds of the right to privacy, the other on the grounds of equal treatment. The Second Circuit Court of Appeal in *Quill v Vacco* (80 F.3d 716 (2d Cir. 1996)) held that the Equal Protection Clause of the Fourteenth Amendment rendered statutes which prohibit assisted suicide unlawful. Noting that New York legislation permitted a competent person to refuse medical treatment even if this resulted in the individual's death, the Court held that assisted suicide should also be permissible on the ground that like persons be treated alike. An *en banc* panel of the Ninth Circuit Court of Appeal in *Compassion in Dying v Washington* (79 F.3d 790 (9th Cir. 1996) (*en banc*)) held that the Washington state statute prohibiting a physician from assisting a patient to die was unconstitutional, as it was contrary to the substantive component of the Fourteenth Amendment's Due Process Clause. Both cases were consolidated for hearing by the Supreme Court in January 1997. The Chief Justice delivered two opinions for the Court in June 1997 overruling both the Second and Ninth Circuits' decisions. In these opinions he was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. However, Justice O'Connor filed a separate concurrence joined by Justices Ginsberg and Breyer. In addition Justices Stevens and Souter filed separate concurrences.

When reading the case one is struck by the manner in which the multiple voices in the decision reflect the differing stances on life both as survival and possibility. The Supreme Court majority opinion attempts to compose a narrative of order in the face of these unruly bodies who attempt to die before their time or out of time. The narrative of

the majority attempts to impose, ‘order through judgment’ (Uhlmann, 1999, p. 139), while the plaintiffs seek ‘an always elusive justice’ (Uhlmann, 1999, p. 139). Within the judgment the law attempts to summon forth a living figure and refuses to see the dying or dead figures before it. This calling forth of a living figure in the face of death is even more pointed as the plaintiffs had already died by the time the Supreme Court justices issued their opinions.

Chief Justice Rehnquist commences his observations in *Washington v Glucksberg* in defensive rhetorical mode and, in so doing, evinces the law’s failure to recognise those who would wish to die otherwise than in the legally sanctioned way:

our laws have consistently condemned, and continue to prohibit, assisting suicide. Despite changes in medical technology and notwithstanding an increased emphasis on the importance of end of life decision-making, we have not retreated from this prohibition. Against this backdrop of history, tradition, and practice, we now turn to respondents’ constitutional claim (521 U.S. 702 (1997) 719).

The backdrop or default is set. The individual is bound by the ‘rights’ which also bind her to an impersonal or state-mediated death. Rehnquist speaks in the rhetoric of warfare: ‘we have not retreated’. He goes on to construct a particular legal relation to assisted death and in so doing reveals a certain conception of community:

We now enquire whether this asserted right has any place in our Nation's traditions. Here... we are confronted with a consistent and almost universal tradition that has long rejected the asserted right, and continues to reject it today, even for terminally ill, mentally competent adults. To hold for respondents, we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every state (521 U.S. 702 (1997) 721–3).

In this passage, the Chief Justice creates the illusion that there is a uniform view on this contested ethical issue. This, however, does not give due consideration to the several contradictory views and practises which coexist. He is interpreting the Constitution in a manner which would give the appearance of unity. Rehnquist appeals to a particular interpretative method and, in so doing, is hailing a particular totalising conception of the nation.

The language of Rehnquist posits a particular societal model based on immunity and survival. In this case one could argue that what is valued most of all is a totalising transcendent being in common of community.³ This relation is built into the law's normative framework in the natural law model of the sanctity of life. This may help to explain how an inalienable right to life is undone when the body politic needs to defend itself or one of its citizens against transgression. This relation to death can be seen as looking to the enforcement of law and exclusion of mere or embodied life. The type of politics implicit in this approach involves discovering the implicit identity of a nation and setting it to work. This conception

of politics as work relies upon and follows from the conception of community as immanent identity. Rehnquist creates the textual illusion of a united homogeneous community. In his judgment he creates the textual boundaries which enclose the citizen in the state. In this regard the law can be seen as a stabilising instrument, a means of suspending in abstract ghostly form identifiable citizens who are simultaneously citizens with an identity. In other words the text of law creates or provokes a symbolic unity where none exists in order to secure the state in its territorial and textual space. This illusory wholeness or togetherness is permanently under siege in the paranoid discourse of the state and of law.

Rehnquist's exclusion of physician-assisted suicide from the domain of rights might be explained by his regarding such deaths as an instance of worklessness. For him such deaths add nothing to the survival of his imagined community. They are pure excess, deaths which do not sublate into building community. In this model, ironically, state executions and killing in time of war are approved of because they appear to uphold the integrity of the community. They maintain societal solidarity, binding it together against the intruder. In the decision of the majority in this case what is eclipsed is the actual choice facing the individual who goes before the Court to obtain recognition of his desire to die with dignity. This process is well described by William Connolly as 'the sedimentation of an ethos into corporeal sensibilities' (Connolly, 1999, p. 179). In this model the individual's plea goes unheard.

THE MICROPOLITICS OF DEATH

Yet even within this model of prohibition, the more the law attempts to curb the voice of the individual who seeks to die with dignity, the more it reveals its own contradictory thinking on the matter. To look more closely at how this unravelling operates, let us return to the United States Supreme Court decision in *Washington v Glucksberg* and *Quill v Vacco* (521 U.S. 702 (1997)). The Chief Justice's attempt to repress societal disagreement on the issue is not successful. Physician-assisted suicide in Rehnquist's schema would appear to act as a threat to a certain construction of communal identity; one built on a unified body of national history, legal traditions and practices. The Supreme Court's assertion of a universal tradition, which eschews euthanasia and physician-assisted suicide, is countered by an alternative tradition of physician assistance in dying, which occurs outside formal legal structures. This gives the lie to the Chief Justice's attempt to create a consensual societal attitude on the issue. In *Washington v Glucksberg* and *Quill v Vacco* (521 U.S. 702 (1997)) the Supreme Court is engaged in a simultaneous imposition and questioning of what constitutes legal tradition. This confirms from within the judgment that there is no single history or tradition. In other words, physician-assisted suicide is not inconsistent with a unified tradition or history but with a *particular* conception of tradition and history.

However, the imbrication of a particular ideology is always contradicted by the operation of law itself as an institutional mechanism of biopolitical management. This requires looking at law not as the guardian of a certain

normative framework but, as Foucault has observed, as a means of administering illegalisms. As Foucault noted: ‘Illegalism is not an accident... I’d say that law is not made in order to forbid any particular kind of behaviour, but in order to distinguish between the different ways of getting around the law itself’ (cited in Deleuze, 2006, p. 114). Deleuze sums up this interpretation of the operation of law thus:

Law is always a structure of illegalisms... laws are not contrasted... with illegality, but... are actually used to find loopholes in others. Law administers illegalisms: some it allows, makes possible or invents as the privilege of the dominating class; others it tolerates as a compensation for the dominated classes, or even uses in the service of the dominating class; others again it forbids, isolates and takes as both its object and its means of domination (Deleuze, 2006, p. 26).

Rehnquist’s attempt to disguise the widespread juridico-medical management of death is contradicted from within the judgment itself. That which is repressed emerges at points within the Supreme Court’s judgment. Justice Stevens in his opinion points to the law’s project of death control in referring to the death penalty:

But just as our conclusion that capital punishment is not always unconstitutional did not preclude later decisions holding that it is sometimes impermissibly cruel, so it is equally clear that a decision upholding a

general statutory prohibition of assisted suicide does not mean that every possible application of the statute would be valid. A State, like Washington, that has authorized the death penalty and thereby has concluded that the sanctity of human life does not require that it always be preserved, must acknowledge that there are situations in which an interest in hastening death is legitimate. Indeed, not only is that interest sometimes legitimate, I am also convinced that there are times when it is entitled to constitutional protection (521 U.S. 702 (1997) 741–2).

Here there is an implicit recognition of existing exceptions to hastening death. Stevens went on to illustrate further the indeterminacies extant in cases which refer to death control:

The *Cruzan* case demonstrated that some state intrusions on the right to decide how death will be encountered are also intolerable. The now deceased plaintiffs in this action may in fact have had a liberty interest even stronger than Nancy Cruzan's because, not only were they terminally ill, they were suffering constant and severe pain...

Although there is no absolute right to physician assisted suicide, *Cruzan* makes it clear that some individuals who no longer have the option of deciding whether to live or to die because they are already on the threshold of death have a constitutionally protected interest that may outweigh the State's interest in preserving life at all costs... It is an interest

in deciding how, rather than whether, a critical threshold shall be crossed (521 U.S. 702 (1997) 745).

In Stevens's opinion we witness a move from a *threshold* to a *critical threshold*. In this move we can see a shift from the normative prohibition on assisted suicide – *the whether* – to the regulatory practise of death control – *the how*. This judicial recognition of *the how* opens a space in which a different attitude towards the issue may emerge. Justice Stevens went on to point out that the Court's decision here was far from definitive:

I do not, however, foreclose the possibility that an individual plaintiff seeking to hasten her death, or a doctor whose assistance was sought, could prevail in a more particularized challenge. Future cases will determine whether such a challenge may succeed (521 U.S. 702 (1997) 750).

Stevens points tantalisingly to the possibility of other interpretations but does not cross the normative threshold in this case. He speaks of regulating *the how* but then in the same move defers the decision. The raising of the possibility of a critical threshold at least acknowledges that the law participates in death control, rather than the disingenuous speech of some of the Justices who seek an uncomplicated right or wrong answer to the dilemma.

Justice Souter speaks in a similar manner to Stevens, but ultimately decides to defer, when he observes:

There can be no stronger claim to a physician's assistance than at the time when death is imminent...

... the importance of the individual interest here... cannot be gainsaid.

Whether that interest might in some circumstances, or at some time, be seen as 'fundamental' to the degree entitled to prevail is not, however, a conclusion that I need to draw here, for I am satisfied that the State's interests... are sufficiently serious to defeat the present claim (521 U.S. 702 (1997) 781-782).

Both Souter and Stevens admit that a right to physician-assisted suicide may be possible and desirable and supported by constitutional tradition, but not in this case. Souter and Stevens disrupt the judgment presented by Rehnquist in which he creates a synthetic past and tradition out of the ritual recitation of precedent, in a narrative which presents an uninterrupted present leading to a perfect future, built on an idealised past. Through the ritual incantation of precedent Rehnquist dawdles on a synthetic boundary between life and death. In this sense what is revealed in the judgment is the very tension within the judgment between a politics of ordering and a politics of becoming.

The legal text operates in a similar way to other texts or forms or writing. Legal writing can, to paraphrase Gilles Deleuze, be 'either a way of reterritorializing oneself, conforming to a code of dominant utterances, to a territory of established states of things' (Deleuze, and Parnet, 199, p. 74), or it is 'becoming, becoming something other than a writer, since what is becoming at the same time becomes something other than writing'

(Deleuze, and Parnet, 199, p. 74). This is also the case within the writing of the judges in this case. On the one hand we have the writing of Rehnquist who reterritorialises in his judgment and forces citizens and himself to conform to a perceived state of dominant utterances, a particular tradition, an ordering of the citizen. The controlled writing of the judge attempts to defer the becoming possible of the right to die with assistance. On the other hand, there is the writing of Souter and Stevens which points to the becoming possible of a right to physician-assisted suicide in future cases.

The concurring opinions particularly of Stevens and Souter point to the possibility in a given case of a right emerging which supports the legalisation of physician-assisted suicide. Within the case itself the problematic case of physician-assisted suicide ‘threatens to bring what’s been established back into question’ (Deleuze, 1995, p. 153). In other words there is a tension between, on the one hand, the established notion of a right to life, and on the other, the problematic case of the individual who would prefer not to live a degraded existence. What is at stake in this very tension, to paraphrase Deleuze, is not the ritual application of human rights principles but the possibility of ‘inventing jurisprudences’. As Deleuze observes, ‘There are no human rights, there is life, and there are life rights... That’s what being on the left is about. It’s creating the right’ (Deleuze, 1996, p. 40).

This tension between stabilising identity or fragmenting it to create new rights and identities is taken up in the wider political context by William Connolly when he speaks of how self-artistry or working on the self may lead to changes in thinking on contentious social issues such as, for example, the right to die. For Connolly, micropolitics can both stabilise identities and also ‘usher a new identity or right into being’ (Connolly, 1999, p.

147). Connolly argues that such new rights or identities cannot be created by a top-down 'molarpolitics of public officials' (Connolly, 1999, p. 149), but comes instead from a mobilisation of self-styling selves, 'the molecular movements of micropolitics' (Connolly, 1999, p. 149). Thus, in the case of assisted suicide, we can see the play between the micropolitics of movements of individuals who are attempting to self-style their deaths; and public officials, in the form of judges, who attempt to maintain the status quo and prevent the creation of this new right. It is the beginning of an elaboration of a new right, an opening to a new way of becoming indiscernible.

This tension one can see reflected in the text of the Supreme Court judgments, which do not engage in some utopian form of objective apolitical legal analysis, but reveal the differing societal attitudes to dying with dignity. The case in fact displays the same process that Connolly describes in relation to an individual who tries to work out a position on the issue in the form of self-artistry or working on the self. An individual in working out their position on controversial ethical issues such as the right to die is confronted with differing sympathies and values. In coming to decide, one is confronted with differing views both outside and within oneself. He gives the example of an individual who believes that death must only come when either God or nature brings it (Connolly, 1999, p. 146). This person is shocked by movements which call for a right to doctor-assisted death for those in severe pain as the result of a terminal illness. However, once the initial shock of this claim dissipates the person begins to think of the suffering of terminally ill individuals in a world of high-tech medical care. In such a case Connolly claims, '*one part of your subjectivity now begins to work on other parts*'. In this case your concern for those who writhe in agony as they approach death may work on contestable

assumptions about divinity or nature already burnt into your being' (Connolly, 1999, p. 146). Connolly highlights the uncertainties and tension within the self on the issue after such an individual starts to weigh up the many competing interests involved. Indeed, having worked on the self:

You continue to affirm... a teleological conception of nature in which the meaning of death is set, but now you acknowledge how this judgment may be more contestable than you had previously appreciated... What was heretofore nonnegotiable may now gradually become rethinkable. You now register more actively the importance of giving presumptive respect to the judgment of the sufferer in this domain, even when the cultivation of critical responsiveness to them disturbs your own conception of nature, death, or divinity (Connolly, 1999, p. 147).

Similarly we can see a working on the self within the legal judgment. In this case the Supreme Court in the end is not swayed from its naturalist interpretation of death in this case but leaves open the possibility that in future cases such an interpretation may be rethought.

CONCLUSION

The micropolitical movements of individuals who challenge the prohibition to die in their own way and in their own time, counters the molar ordering of the subject by the medico-legal gaze. They call for another politics, a politics of becoming beyond the time of the political. This micropolitics points the way to a rethinking of bioethics, focusing instead on the actual desires and interests of the individual who claims a right to die with dignity. This is what Connolly calls an ethos of engagement with existing moral and social givens, which may bring about unexpected consequences or transformations in the societal default thinking on issues like the right to die. This process Connolly terms ‘an ambiguous *politics of becoming* by which a new entity is propelled into being out of injury, energy and difference’ (Connolly, 1999, p. 160). Micropolitical movements such as the right to die movement ‘expose modes of suffering and injury heretofore located below the radar of public discourse. Sometimes the politics of becoming exposes how a list of basic rights that recently seemed complete harboured obscure and inadvertent exclusions inside the sweep of its formulations’ (Connolly, 1999, p. 160).

This is a politics of self-artistry which can result in a transformation of accepted notions of right. In controlling the time of one’s passing one enacts an ethics of *bios*, of embodied life. A decision of the Constitutional Court of Columbia in 1997 made clear what is at stake in thinking our ways of dying differently and how such a rethinking could come about in practice: ‘The decision as to how to face death takes on a decisive importance for the terminally ill person, who knows that his illness is incurable and therefore is not choosing between many years of full life, but rather between dying in conditions of his own choosing within a short period, or in painful and undignified

circumstances. The basic right to a dignified life therefore implies the right to die with dignity' (cited in Tripodina, 2001, p. 1727).

Notes

¹ For a full elaboration see R. Braidotti (2006) *Transpositions* (Cambridge: Polity Press), pp. 234–50.

² The phrase is taken from J. Hillis Miller (1990) *Versions of Pygmalion* (Cambridge: Harvard University Press), p. 158. The complete sentence reads: ‘If prosopopoiea in one of its meanings is the ascription of a face, a voice, or a name to the dead, a letter sent to a dead person is a strange kind of prosopopoiea’.

³ In a previous Supreme Court decision, *Cruzan v Director, Missouri Department of Health* (497 U.S. 261 (1990)), a case involving the issue of treatment withdrawal for individuals in a persistent vegetative state, Justice Scalia exhibits a similar logic of survival as that displayed by Rehnquist in the case under examination. Scalia employs the metaphor of the Court destroying itself if it were to decide affirmatively in cases concerning the right to die. The Court, according to Scalia, must save itself by employing the language of the law against the introduction of such a right:

This Court need not, and has not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so, it will destroy itself (497 U.S. 261, 300–301).

Scalia believes in the differentiation between legislative policy-making which he associates with rationality, and judicial decision-making which, in such cases, he associates with ‘irrationality and oppression’. In allowing individuals to determine when

their life should end the Court according to Scalia ‘will destroy itself’. Scalia’s assertion here points to the actual question which the court asks in cases concerning end of life decision-making (or more correctly, death control) – not one which demands ‘*should the plaintiff live or die?*’ but ‘*should we the court live or die?*’ Scalia’s violent metaphors point to an anxiety about upsetting borders, between life and death, between the judiciary and the legislators. It is a logic within which the twin fantasies of textual integrity and societal wholeness must be upheld.

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